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Glenna Stewart v. Charles Bova, M.D. and Pioneer Valley Hospital : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GLENNA STEWART, Plaintiff and Appellee, v. CHARLES BOVA, M.D. and PIONEER VALLEY HOSPITAL, Defendants and Appellants.	: : : : : : : : : :	Case No. 20100036 (Third District Case No. 090900273)

REPLY BRIEF OF DEFENDANTS/APPELLANTS CHARLES BOVA, M.D. and PIONEER VALLEY HOSPITAL

Appeal from a Memorandum and Order Denying Motion to Compel Arbitration and Stay Litigation.
Honorable John Paul Kennedy, Presiding

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I. THE APRIL 16TH AGREEMENT SHOULD BE ENFORCED BECAUSE PLAINTIFF'S EXECUTION OF THE AGREEMENT WAS NOT PROCEDURALLY UNCONSCIONABLE.

Throughout the proceedings in the trial court and in Plaintiff's brief, Plaintiff asserts that "[section] 78B-3-421(1)(c)'s verbal encouragement provision must be enforced according to its terms" and that this Court "should rule that an arbitration agreement is not 'validly executed' if the health care provider failed to 'verbally encourage...'"(Pl.'s Br. at p. 13). As before the trial court, Plaintiff asserts a strict application of the statute and avoids an analysis of whether any failure to "verbally encourage" her to ask questions rendered the Agreement procedurally unconscionable. Indeed, Plaintiff asserts that "the trial court did not even rule on appellee's defense that the arbitration agreement is [not] invalid due to unconscionability" (Pl.'s Br. at p. 21).

Despite Plaintiff's efforts, however, she ultimately acknowledges that the purpose of section 78B-3-421(1) is to impose "detailed requirements that protect *patients* from unconscionable arbitration agreements." (*Id.* at p. 24) (emphasis original). Dr. Bova could not agree more. The plain underlying purpose of the requirements set forth in section 78B-3-421(1) is to ensure that patients who execute arbitration agreements with their physicians understand the terms of those agreements. Accordingly, if a patient acknowledges that she understands the terms of an arbitration agreement, that agreement

should be enforced because the underlying purpose of the statute has been satisfied. *See State v. Miller*, 2008 UT 61, ¶ 18, 193 P.3d 92 (stating rules of statutory interpretation "require the court to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve").

Glaringly absent from the trial court record and Plaintiff's brief is any explanation of how the alleged failure to verbally encourage her to ask questions about the Agreement compromised her ability to understand the terms of the Agreement. (*See* R.; Pl.'s Br.) Indeed, Plaintiff has failed to identify a single question that she could have, or would have asked if she were verbally encouraged to do so, or how the answer to that question would have caused her to not sign the Agreement. (*See id.*) Plaintiff attempts to side-step this deficiency by imploring this Court to ignore the underlying purpose of the statute and myopically conclude that Dr. Bova's inability to "prove" that he met the verbal encouragement requirement of section 78B-3-421(1)(c) trumps the Agreement's compliance with every other requirement of the statute and Plaintiff's undisputed acknowledgments that she understood the terms of the Agreement. (*See* Pl.'s Br. at pp. 12-18). Of course, the only way Plaintiff's argument works is if the Court ignores well-established precedent on the application of the parol evidence rule prohibiting exactly what the trial court did in this case: considering the extrinsic evidence of Plaintiff's declarations to contradict her acknowledgments that she understood the terms of the Agreement, or, alternatively, expand the permissible use of extrinsic evidence to establish

procedural unconscionability. (*See* Pl.'s Br. at pp. 18-21). This Court should reject Plaintiff's overtures to suspend reason, and hold that Plaintiff's undisputed acknowledgments demonstrate that the underlying purpose of section 78B-3-421(1) has been satisfied.

A. Plaintiff's Undisputed Acknowledgments That She Understood the Terms of the April 16th Agreement, and the Circumstances Surrounding Her Execution of the Agreement, Belie Her Claim of Procedural Unconscionability.

Plaintiff attempts to avoid having her arguments characterized under the doctrine of procedural unconscionability ostensibly because she realizes that she cannot meet her heavy burden to demonstrate that her execution of the Agreement was procedurally unconscionable. Plaintiff's acknowledgment, however, that the underlying purpose of the requirements set forth in section 78B-3-421(1) is to "protect patients from unconscionable agreements" reveals what Dr. Bova has contended all along: the basis of Plaintiff's argument—and the trial court's decision—is rooted in the doctrine of procedural unconscionability. Accordingly, the correct inquiry is not just whether one of several statutory requirements was not met, but whether the execution of the Agreement was procedurally unconscionable.

Factors bearing on procedural unconscionability include:

> (1) whether each party had a reasonable opportunity to understand the terms and conditions of the agreement; (2) whether there was a lack of opportunity for meaningful negotiation; (3) whether the agreement was printed on a duplicate or boilerplate form drafted solely by the party in the

> strongest bargaining position; (4) whether the terms of the agreement were explained to the weaker party; (5) whether the aggrieved party had a meaningful choice to accept the terms of the agreement; and (6) whether the stronger party employed deceptive practices to obscure key contractual provisions.

Ryan v. Dan Food Stores, Inc., 972 P.2d 395, 403 (Utah 1998). None of these factors is dispositive. *Id.* Rather, this Court should "consider all of the circumstances in light of the doctrine's purpose to prevent oppression and unfair surprise." *Id.* Conspicuously absent from Plaintiff's brief is an analysis of these well-established factors. (*See* Pl.'s Br.) That is not surprising since Plaintiff did not experience oppression or unfair surprise.

Foremost, it remains undisputed that Plaintiff acknowledged that she understood the terms of the Agreement. (*See* Pl.'s Br.; Addendum B to Dr. Bova's Opening Brief at Art. 9). Plaintiff expressly acknowledged:

> I have received a written explanation of the terms of this Agreement. I have had the right to ask questions and have my questions answered. I understand that any Claims I might have must be resolved through the dispute resolution process in this Agreement instead of having them heard by a judge or jury. I understand the role of the arbitrators and the manner in which they are selected. I understand the responsibility for arbitration related costs. I understand that this Agreement renews each year unless cancelled before the renewal date. I understand that I can decline to enter into the Agreement and still receive health care. I understand that I can rescind this Agreement within 10 days of signing it.

(Addendum B at Art. 9). Plaintiff's acknowledgments that she received a written explanation of the terms of the Agreement, that she understood her claims would be arbitrated, and understood the role of the arbitrators and how they would be selected not only demonstrate that Plaintiff had a reasonable opportunity to understand the terms and conditions of the Agreement, but that she did, in fact, understand its terms. *See Ryan,* 972 P.2d at 403. Plaintiff's claim of procedural unconscionability is hollow for this reason alone.

In addition, Plaintiff's undisputed acknowledgments that she knew she could decline to enter the Agreement and still receive care, and that she could rescind the Agreement within ten days of signing it (Addendum B at Art. 9), demonstrate that Plaintiff had a meaningful choice to accept the terms of the Agreement. Moreover, Plaintiff's undisputed acknowledgment that she received a written explanation of the terms of the Agreement and had the opportunity to ask questions and have those questions answered (Addendum B at Art. 9) demonstrate that the terms of the Agreement were explained to her. Fundamentally, if this Court is to give any weight at all to Plaintiff's acknowledgments, the only rational conclusion is that Plaintiff's claim of procedural unconscionability is without merit because Plaintiff understood what she was signing.

This conclusion is further buttressed by the circumstances surrounding Plaintiff's execution of the Agreement. It remains undisputed that Plaintiff executed an identical Agreement a day later (*i.e.*, the April 17th Agreement attached to Dr. Bova's Opening Br.

at Addendum C).[1] The April 17th Agreement contains all of the same acknowledgments as the April 16th Agreement, and provided Plaintiff with yet another opportunity to understand the terms of the April 16th Agreement, and to rescind it if she did not agree to its terms. (*See* Addendum C). Moreover, the presence of Plaintiff's daughter at the time she executed the April 16th Agreement—a nurse who is familiar with physician/patient arbitration agreements—also supports the conclusion that Plaintiff had a meaningful opportunity to understand the Agreement's terms. [R. 29]. Plaintiff's claim that the execution of the Agreement was rendered procedurally unconscionable by Dr. Bova's alleged failure to meet only one of several statutory requirements is specious in light of her own undisputed acknowledgments, the presence of her daughter when she executed the Agreement, and the undisputed fact that she signed an identical agreement a day later.

B. Any Alleged Failure to Verbally Encourage Plaintiff to Ask Questions About the Agreement is Negated By Plaintiff's Failure to Identify a Single Question She Would Have Asked Had She Been Verbally Encouraged to Do So.

The purpose of the "verbally encourage" requirement's purpose derives from a patient having questions about an arbitration agreement that she needs answered so that she may understand what she is signing. Thus, Plaintiff's assertion that Dr. Bova's

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[1] Interestingly, Plaintiff never mentions the April 17th Agreement in her brief. (*See* Pl.'s Br.) Plaintiff's execution of an identical arbitration agreement a day later belies her contention that her understanding of those agreements was compromised by Dr. Bova's failure to "verbally encourage" her to ask questions about the April 16th Agreement.

failure to verbally encourage her to ask questions about the Agreement necessarily leads to a threshold inquiry of what specific question or questions Plaintiff needed to ask to improve her understanding of what she was signing. Throughout the trial court proceedings and Plaintiff's brief, however, Plaintiff has failed to identify a single question that she would have asked if she were verbally encouraged to do so, or how such question would bear on the decision to agree to arbitration. (*See* R.; Pl.'s Br.) Plaintiff's inability to identify any questions she needed to ask to improve her understanding of the Agreement leads to Plaintiff's corresponding inability to explain to this Court how failing to satisfy the verbally encouraged requirement compromised Plaintiff's ability to understand what she was signing. (*See id.*) The absence of any such explanation is fatal to Plaintiff's underlying claim of procedural unconscionability.

Further, it is undisputed that Plaintiff "had the right to ask questions and have my questions answered." (Addendum B at Art. 9). Accordingly, the underlying purpose of the "verbally encourage" requirement was satisfied because Plaintiff knew she could ask questions about the Agreement if she had any, regardless of whether she was verbally encouraged to do so. *C.f. R&R Indus. Park, L.L.C. v. Utah Property and Cas. Ins. Guar. Ass'n*, 2008 UT 80, ¶ 36. 199 P.3d 917 (holding that specific statutory language should not be interpreted in a manner that would "undermine the purpose of the statute").

Indeed, whether Plaintiff was verbally encouraged to ask questions or not is rendered irrelevant in light of the undisputed facts: (1) the Agreement contains all of the information the legislature required to be communicated to her about arbitration (*compare* Addendum B *with* § 78B-3-421(1)(a) and (b)); and (2) Plaintiff knew she could ask questions about that information if she had any. Plaintiff's argument—and the trial court's ruling—boils down to a semantical, rather than a substantive difference between a patient knowing that she can ask questions about an agreement and being "verbally encouraged" to ask questions about an agreement; especially when she has no questions to ask. Contrary to Plaintiff's urging, this Court should not base its decision on a mere difference in semantics.

C. This Court Should Not Expand the Use of Extrinsic Evidence to Include Determinations of Procedural Unconscionability.

Plaintiff argues that "[t]he parol evidence rule does not apply to this case because appellee has not attempted to 'vary' or 'add to' the terms of the arbitration agreement." (Pl.'s Br. at p. 18). Plaintiff also asserts that she "has never asked the Court to alter any of the contract's unambiguous terms based on such outside-of-the-contract evidence." (*Id.* at 19). Plaintiff's argument and assertions are simply wrong.[2]

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[2] Plaintiff also contends that because section 78B-3-421(1) "imposes requirements that go beyond the common law of contracts," the parol evidence rule and any other common law of contracts should not apply to preclude consideration of Plaintiff's declarations because of a "conflict between the common law and a statute." (Pl.'s Br. at p. 18). Plaintiff's contention, however, is without merit. There is nothing in the language of section 78B-3-421(1) that allows for the use of extrinsic evidence to demonstrate

It is undisputable that Plaintiff submitted her declarations to contradict her unambiguous acknowledgments in the Agreement that she: (1) received a written explanation of the agreement; (2) had the right to ask questions and have them answered; (3) received a copy of the Agreement; and (4) ultimately understood the terms of the Agreement. (*Compare* R. 42 *with* Addendum B at Art. 9; *see also* Pl.'s Br. at p. 14, fn. 1). Indeed, the fundamental basis of the trial court's ruling is grounded in the contradictory statements found in Plaintiff's declarations. (*See* R. 349-352). Plaintiff cannot now escape the fact that based on her urging, the trial court relied on her impermissible extrinsic evidence in rendering its decision.

Plaintiff also argues that the Utah Supreme Court's holding in *Tangren Family Trust v. Tangren*, 2008 UT 20, 182 P.3d 326 stands for the proposition that "the parol evidence rule does not prevent the Court from considering [extrinsic] evidence to determine compliance with § 78B-3-421." (Pl.'s Br. at pp. 19-20). Plaintiff's interpretation of *Tangren*, however, is incorrect. In *Tangren*, the Supreme Court expressly stated that "we will nevertheless allow extrinsic evidence in support of an argument that the contract is not, in fact, valid ***for certain reasons that we have specified.***" *Tangren*, 2008 UT 20 at ¶ 15 (emphasis added). The Court went on to specify the reasons when parol evidence will be allowed: "where the contract is alleged to be a

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compliance or non-compliance with its requirements. Thus, there is no conflict between the parol evidence rule—or any other common law of contracts—and the language of the statute giving rise to a statutory preemption of the common law of contracts.

forgery, a joke, a sham, lacking in consideration, or where a contract is voidable for fraud, duress, mistake, or illegality." *Id.* In the instant case, Plaintiff has not asserted that the Agreement is a forgery, a joke, a sham, lacking in consideration, or is voidable for fraud, duress, mistake, or illegality. (*See* R.; *see also* Pl.'s Br.) Rather, Plaintiff argues that her declarations should be considered to determine whether Dr. Bova complied with the requirements of § 78B-3-421(1). (*See* Pl.'s Br. at pp. 19-20). Plaintiff's stated use of—and the trial court's reliance on—her declarations is not one of the several reasons specified by the *Tangren* court which allow for the use of extrinsic evidence. *See Tangren*, 2008 UT 20 at ¶ 15. Accordingly, the trial court erred in relying on Plaintiff's declarations to find that the Agreement was not validly executed.

Plaintiff has failed to cite to any relevant authority which holds that extrinsic evidence can be used to contradict express unambiguous acknowledgments in a contract in an effort to demonstrate procedural unconscionability. (*See* R. 349-352; Pl.'s Br.) That is because no such authority exists. Indeed, what Plaintiff is asking this Court to do is expand the use of extrinsic evidence to include determinations of whether the execution of an unambiguous contract was procedurally unconscionable. (*See* Pl's Br. at pp. 18-21). This would, of course, mean that every party to a contract could challenge the validity of the contract by simply submitting an after-the-fact declaration or affidavit that contradicts unambiguous and express language indicating that they understood the terms of the contract. This undesirable result is precluded not only by well-established precedent

regarding the application of the parol evidence rule, but by fundamental principles of contract law. *See Western Properties v. Southern Utah Aviation, Inc.*, 776 P.2d 656, 658 (Utah Ct. App. 1989) (holding "a signatory cannot, with hindsight, claim ignorance of the contract and thereby escape liability"); *Resource Management Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1047 (Utah 1985) (holding "[e]ach party has the burden to understand the terms of a contract before he affixes his signature to it and may not thereafter assert his ignorance as a defense"); C.J.S. Contracts § 705 (2010) (stating "a person who signs a contract must be presumed to have read, understood and assented to it . . . .and "[t]he fact that a contracting party fails to read papers or does not have someone else read them to him or her does not rebut the presumption").

II. PLAINTIFF'S INTERPRETATION OF UTAH CODE ANN. § 78B-3-421 IS UNTENABLE AND WOULD RESULT IN UNACCEPTABLE CONSEQUENCES.

Plaintiff argues that Defendants must prove through extrinsic evidence that Plaintiff was verbally encouraged to read the Arbitration Agreement and ask questions. Yet, other than the suggestion that Dr. Bova could have filed an affidavit, neither the trial court nor Plaintiff have explained how Dr. Bova could have, or should have, proved verbal encouragement. In her brief, Plaintiff carefully avoids any discussion of the practical consequences of her interpretation of Utah Code Ann. § 78B-3-421. Without further explanation or practical discussion, Plaintiff states that "there is nothing difficult—let alone impossible—about proving compliance with § 78B-3-421." (*See* Pl.'s

Br. at p. 23.) However, taken to its logical conclusion, Plaintiff's interpretation of section 78B-3-421 would unavoidably lead to factual disputes which legislature sought to avoid and, ultimately, to far fewer arbitrations.

In Utah, statutes must be "interpreted in a reasonable way, with an eye toward the construction that will achieve the best results in practical application, will avoid unacceptable consequences, and will be consistent with sound public policy." *Derbridge v. Mutual Protective Ins. Co.,* 963 P.2d 788, 791 (Utah Ct. App. 1998)(internal citations and quotations omitted). *See also Wasatch County v. Tax Com'n*, 2009 UT App. 221, ¶ 13, 217 P.3d 270 (noting that statutes should be interpreted with any eye toward "the effect it will have in practical application"). In other words, Utah courts "interpret a statute to avoid absurd consequences," *State v. Redd,* 1999 UT 108 at ¶ 12, 992 P.2d 986, and to arrive at "a reasonable and sensible construction." *State v. Garcia,* 965 P.2d 508, 512 (Utah Ct.App.1998) (quoting *State v. GAF Corp.,* 760 P.2d 310, 313 (Utah 1988)).

In this case, neither the Plaintiff nor the trial court explain how a medical provider can sufficiently prove verbal encouragement through extrinsic evidence. Plaintiff vaguely argues that "[h]ealthcare providers seeking to enforce arbitration agreements subject to § 78B-3-421 have access to all of the standard tools and methods that parties use to prove facts in court." (*See* Pl.'s Br. at p. 23.) Plaintiff does not, however, provide a single example of such "methods."

The most obvious form of evidence to prove verbal encouragement would be the arbitration agreement itself.[3] However, under the reasoning of Plaintiff and the trial court, the arbitration agreement no matter how detailed would be insufficient to prove verbal encouragement. Extrinsic evidence would always be necessary. For example, at the trial court hearing on this issue, the following exchange occurred between defense counsel and the court:

> **Hester**: What we are talking about here is a woman who signed two agreements that say the exact same thing, ostensibly in the presence of a daughter who knew exactly what she was signing.
> **Judge**: Legally that is insufficient because she was not verbally encouraged.
> **Hester**: That's what I understand their position to be based on extrinsic evidence only.
> **Judge**: Well, how else can you do it other than by extrinsic evidence? If you put a paragraph in the agreement that says I hereby concede that I was verbally encouraged to read and ask, you put that as a clause in your contract, they are going to say, well, I wasn't verbally encouraged and I wasn't verbally told and I didn't read this.

[R. 231]. Thus, under the Trial Court's analysis, health care providers could never prove verbal encouragement through the arbitration agreement or any other writing because the patient could simply claim that she never read it.

As Defendants explained in their initial brief, absent a recording of the conversation, there is no way to positively prove that "verbal encouragement" occurred.

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[3]For example, in this case, the Plaintiff affirmed that she "received a written explanation of the terms of this Agreement, understood the terms and "had the right to ask questions and have my questions answered." (*See* Pl.'s Br.; Addendum B to Dr. Bova's Opening Brief at Art. 9)

Given that a written acknowledgment is insufficient and a recording is not feasible, the only evidence a health care provider could possibly offer is an affidavit. The affidavit could state that the health care provider remembers verbally encouraging the patient to read and ask questions regarding the arbitration agreement. However, given the amount of patients that health care providers treat, it is more likely that the affidavit would simply state that it is his policy or practice to provide such verbal encouragement. This affidavit would then be weighed against the patient's affidavit creating either a jury question or, if allowed, a evidentiary hearing in which the trial court would be forced to weigh the credibility of dueling affidavits. This result was certainly not anticipated or intended by the legislature.

It is clear from the language of section 78B-3-421 that the legislature intended to avoid this type of factual dispute. For example, Utah Code Ann. section 78B-3-421 specifies mandatory agreement terms and includes the information that must be provided to the patient regarding arbitration, how that information is to be provided to the patient, and an acknowledgment by the patient that she received the information. *See* Utah Code Ann. § 78B-3-421(1) (2008). If the arbitration agreement includes the information specified in the statute, and the patient signs a written acknowledgment of having received a written explanation of the agreement terms, then the patient is essentially foreclosed from claiming ignorance of the agreement. In pertinent part, section 78B-3-421(4) provides:

(4) A written acknowledgment of having received a written explanation of a binding arbitration agreement signed by or on behalf of the patient shall be a defense to a claim that the patient did not receive a written explanation of the agreement as required by Subsection (1) unless the patient:

(a) proves that the person who signed the agreement lacked the capacity to do so; or

(b) shows by clear and convincing evidence that the execution of the agreement was induced by the health care provider's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts.

The statute is designed to prevent patients from nullifying valid agreements through claims of ignorance. The legislature clearly intended to avoid factual disputes regarding the enforceability of arbitration agreements. Given how carefully the legislature sought to avoid factual disputes regarding the written agreement, it seems inconceivable that the legislature intended to create factual disputes regarding "verbal encouragement."

Moreover, under Utah law, it is unclear whether it is even the trial court's role to weigh the credibility of evidence to determine the enforceability of an arbitration agreement. Generally, it is not a trial court's duty to weigh contravening evidence; this task is exclusively reserved for a jury. *See e.g. Winters v. W.S. Hatch Co., Inc.*, 546 P.2d 603, 605 (Utah 1976) ("The court is not free to weigh the evidence, and the weight of the evidence and the credibility of the witnesses are within the jury's sole province.") Indeed, in this case the trial court expressed serious reservations about the prospect of having to weigh evidence. The trial court expressly stated that it did not know whether it

was the duty of the judge or the jury to weigh the credibility of evidence where the issue is the enforceability of an arbitration agreement. (R.228-29.)

If it is the jury's role to weigh the credibility of evidence in a dispute over the enforceability of an arbitration agreement, then the entire purpose of arbitration would be frustrated. The principle purpose of arbitration is to avoid the time and expense of trial. This purpose is obviously nullified if a jury must be called to determine whether or not an arbitration agreement is even enforceable in the first place. Additionally, even if the trial court may appropriately weigh the credibility of evidence in this circumstance, the purpose of arbitration is still undermined. Months of briefing, affidavits and memoranda, to ultimately have the issue decided at an evidentiary hearing is both time-consuming and costly. In other words, the inevitable factual dispute that would arise from the trial court's analysis of the statute would undermine the purpose of arbitration.[4]

CONCLUSION

The April 16th Agreement is valid and enforceable under both Utah statutory mandate, and Utah contract law. Plaintiff's unambiguous acknowledgments clearly demonstrate that she understood the terms of the Agreement negating her claims of procedural unconscionability. The trial court's strict interpretation of Utah Code Ann. § 78B-3-421 undermines the purpose of the statute and the Utah Healthcare Malpractice

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[4]This also undermines the purpose of the Utah Health Care Malpractice Act. *See* Utah Code Ann. 78B-3-402.

Act and makes "verbally encouragement" all but impossible to prove. Accordingly, this Court should reverse the trial court and order Plaintiff to arbitrate her claims pursuant to the terms of the April 16th Agreement.

Respectfully submitted this 20 day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2010, I caused two (2) true and correct copies of the foregoing to be mailed postage prepaid thereon, by first class mail in the United States mail, to the following:

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